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Defamation, Invasion of Privacy, and the Constitutional Standard of Care

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DEFAMATION, INVASION OF PRIVACY, AND THE CONSTITUTIONAL STANDARD OF CARE

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I. A SHIFT IN DIRECTION: THE *Gertz* CASE

Prior to June of 1974, it appeared that in all defamation actions involving matters of public interest, application of the standard enunciated in *New York Times Co. v. Sullivan*[1] was constitutionally required: the plaintiff was obliged to prove that the defendant had published the defamatory material with reckless disregard for falsity.[2] In *Gertz v. Robert Welch, Inc.*,[3] the United States Supreme Court changed this standard. The Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual."[4]

For "public officials" and "public figures," the "reckless disregard" or constitutional malice[5] standard remains intact. But where private individuals are involved, the states, while free to impose the exacting constitutional standard, are not

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1. 376 U.S. 254 (1964).

2. *Sullivan* involved defamation of public officials. The same standard was applied to cases involving defamation of public *figures* in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), was generally understood as extending the *Sullivan* standard to all matters of public interest. For brevity, the standard for both public officials and public figures will be referred to hereinafter as the *Sullivan* standard.

3. 418 U.S. 323 (1974).

4. *Id.* at 347.

5. *See* note 2 *supra*. The constitutional privilege afforded publication concerning public officials and public figures is lost if the plaintiff can prove that publication was motivated by "malice," *i.e.*, publication of defamatory material with knowledge of its falsity or reckless disregard for truth. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279-82 (1964). The particular state of mind specified in *Sullivan* is often called "constitutional malice," to distinguish it from common law malice—"spite or . . . improper motive"—which, in a defamation action, is "implied by the law from an intentional publication of a defamatory character" and need not be proved. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 771-72 (4th ed. 1971).

required to do so.[6] They need only set a standard of proof for defamation of private individuals that is more demanding than liability without fault; as a minimum, the plaintiff must prove negligence.

A standard of proof less stringent than constitutional malice, however, will limit recoverable damages. The *Gertz* Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[7] Thus, a plaintiff who shows only negligent publication of defamatory material is restricted to "compensation for actual injury";[8] he is not, however,

> limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering . . . . [T]here need be no evidence which assigns an actual dollar value to the injury.[9]

The states may, of course, impose additional standards for recovery, such as proof of special damages or actual pecuniary loss, or they may eliminate punitive damages entirely.[10] The *Gertz* decision simply establishes minimal standards.

It is clear that the thrust of the *Gertz* opinion is in opposite directions: on the issue of liability, the Court has moved toward a more liberal standard of recovery for private individuals; but on the issue of damages, it has adopted a stricter test, eliminating punitive awards unless constitutional malice is shown and prohibiting recovery of compensatory damages based solely on a presumption of injury.

If it is assumed that constitutional inroads into the defamation area have been prompted chiefly by the Court's concern with the free-speech implications of excessive damage recover-

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6. It is unclear whether the state trend will be to continue application of the *Metromedia* standard as a matter of common law. *Compare* AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974), *with* Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975).

7. 418 U.S. at 349.

8. *Id.*

9. *Id.* at 350.

10. *See* Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Cal. 1974), *appeal docketed,* No. 75-1306, 9th Cir., Feb. 10, 1975, prohibiting recovery of punitive damages by a public figure even though constitutional malice is shown. *See also* Stone v. Essex County Newspapers, Inc., ___ Mass. ___, 330 N.E.2d 161 (1975), involving a public figure.

ies, and if it is further assumed that inordinately large awards are attributable primarily to the availability of punitive damages,[11] the decision can be viewed as a first amendment bulwark. That evaluation may be inaccurate, however, for two reasons: first, very substantial judgments can be recovered in defamation actions under the label "compensatory" damages; and second, the cost of defending a defamation action may have a substantial chilling effect, even if no judgment, or one for nominal damages only, is obtained.

The *Sullivan* standard of liability has proved to be a very exacting one, allowing few recoveries. The *Gertz* liability standard for private individuals is demonstrably more relaxed.[12] Essentially, the difference in the two standards is a matter of policy: the Supreme Court has evaluated competing interests and determined that the free speech interest shall be accorded substantially less weight when the reputation of a private individual is involved. Why the Court reached this conclusion is best explained by examining the reasoning of the *Gertz* opinion.

II. The Policy Justification for Gertz

In *Gertz*, the Court offers two fundamental reasons for affording different treatment in defamation actions to public and private individuals: first, public officials and public figures generally have greater access to communications media than private individuals do, and thus have "a more realistic opportunity to counteract false statements";[13] and second, public persons "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood . . . ."[14]

It is evident that these two generalizations will not prove true in every case. The Court, however, assumes that under

11. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 284 (1964).

12. Questions as to the constitutional sufficiency of evidence to establish negligence in defamation cases are outside the scope of this article. Obviously, however, many problems will be raised. For example, will expert testimony as to the standards of care prevalent in the communications industry be necessary where the defendant is a communications medium? Can failure to retract a defamatory statement constitute negligence under *Gertz*? Will negligence per se (failure to meet an applicable statutory standard) be sufficient? Justice Brennan, dissenting in *Gertz*, decried "the flexibility which inheres in the reasonable care standard" and expressed fear that its application will result in substantial muzzling of the press. 418 U.S. at 361.

13. *Id.* at 344.

14. *Id.* at 345.

most circumstances they are accurate, and opts for a rule of general application in order to avoid the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . . ."[15]

Indeed, it is arguable that the second factor, voluntary exposure, is a legal fiction: although public persons may voluntarily seek publicity, they seldom seek to be defamed. The Court, however, is recognizing a kind of trade-off: if a person voluntarily seeks public exposure, part of the price he must pay is the increased risk of being defamed. The only voluntary act is that of "going public"; the exposure is a necessary and unavoidable concomitant. Nor does the Court seem disposed to bend its uniform rule when the facts of an individual case might show that a particular "public figure" did *not* voluntarily seek exposure: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[16]

Are such instances, in fact, likely to be rare? If not, then a basic premise of the *Gertz* decision is unfounded. Moreover, the Court's preference, as a matter of judicial policy, for uniform rule application is undercut: trial courts, in order to determine whether the plaintiff is a "public" person and thus whether the *Gertz* or the *Sullivan* standard applies, must still make *ad hoc* determinations. Further analysis of these issues requires a closer examination of what the Court means by the terms "public" and "private."

The "Public" and the "Private" Person

Public officials. The "public official" is probably the easiest person to identify in the Court's classification of defamation plaintiffs, although significant areas of uncertainty exist. In *Rosenblatt v. Baer,*[17] the Court stated, "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."[18] Government employee status

15. *Id.* at 346.
16. *Id.* at 345.
17. 383 U.S. 75 (1966).
18. *Id.* at 85.

should generally be fairly easy to determine. But "substantial responsibility for or control over the conduct of government affairs" is another matter. Substantiality is hardly a precise concept, and raises the spectre of the kind of *ad hoc* decision-making which the Court professes to avoid.

Moreover, the test clearly has two prongs, and either will invoke the *Sullivan* standard. If the employee has substantial actual responsibility or control, the *Sullivan* constitutional malice rule applies, whatever the appearances may be; and the same standard will apply despite lack of any *actual* responsibility or control, if the employee "appear[s] to the public" to have such responsibility or exercise such control.[19] This "public appearance" test clearly suggests that an individual might "involuntarily" become a public person, if he neither knew nor had reason to know that he "appeared" to exercise substantial control over the conduct of government affairs. How does one characterize a legislator's secretary, who keeps his calendar and makes sure that he meets all of his appointments on schedule? Does she not have, or appear to have, substantial responsibility or control? Or must the control be direct, rather than indirect? If so, where is the line that marks off those functions which have a sufficiently direct effect on the conduct of government affairs to trigger the *Sullivan* standard, from those that do not?[20]

The defamation plaintiff who neither is nor appears to be a public official with substantial responsibility or power may still find himself confronting the nearly insurmountable barrier of the *Sullivan* test if he is characterized as a "public figure." Either type of public status will result in the plaintiff's being required to prove that the defendant published defamatory material with knowledge of its falsity or reckless disregard for the truth.

Public figures, all-purpose and limited. The *Gertz* Court divides public figures into two subcategories:

> Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have

19. *Id.* See text accompanying note 18 *supra*.

20. Introducing concepts of "direct" or "indirect" control raises serious questions about the usefulness of the public official rule. What of the state-employed teacher who may indirectly exercise considerable influence over the future course of government affairs through the process of educating potential presidents and legislators? If that hypothetical seems clearly beyond the permissible parameters, *how far* beyond?

> thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.[21]

The stricter *Sullivan* standard presumably applies only when the alleged defamation involves matters related to a person's public status; as to other matters, the less stringent *Gertz* rule applies, even though the person may in fact be a public figure. The limited applicability of the *Sullivan* standard is demonstrated in both *Gertz* and the earlier case of *Garrison v. Louisiana*.[22]

In *Garrison*, which involved a public official, the Court held that the public's interest—and thus the protection of the *Sullivan* rule—extends to "anything that might touch on an official's fitness for office."[23] How wide this interest legitimately may be, and how peripheral a matter may be pulled under the *Sullivan* umbrella by such public interest, is unclear; but certainly the Court intended to give "public interest" very wide scope. The *Gertz* Court, after discussing *Garrison*, observed: "Those classed as public figures stand in a similar position."[24] The suggested analogy between public officials and public figures is not clear. In *Garrison*, the test for the applicability of the *Sullivan* rule was whether the defamatory statements concerned the official's "fitness for office," and by definition, a public figure is not a public officeholder or government employee. Since an "all-purpose public figure" is one who has attained a general notoriety in the community, or has become pervasively involved in public affairs,[25] the Court probably intended to suggest that any matter related to incidents or affairs that make such an individual a subject of public interest is entitled to *Sullivan* protection. Obviously, the scope of such public interest, as in the case of the public figure, is very broad.

But the same is not true of the limited-purpose public figure, as the *Gertz* decision illustrates. Gertz, a lawyer, had allegedly been libeled by an article appearing in the magazine *American Opinion*, which the Court describes as "a monthly outlet for the views of the John Birch Society."[26] The matter

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21. 418 U.S. at 345.
22. 379 U.S. 64 (1964).
23. *Id.* at 77.
24. 418 U.S. at 345.
25. *Id.* at 352.
26. 418 U.S. at 325.

arose in 1968 when "a Chicago policeman named Nuccio shot and killed a youth named Nelson."[27] After a coroner's inquest into the death of the youth, the policeman was prosecuted and convicted of second degree murder.

The Nelson family retained Gertz to prosecute a wrongful death action against Nuccio. It was at this juncture that the defendant became involved. Early in the 1960's the magazine "began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship."[28] In March, 1969, *American Opinion* published an article accusing attorney Gertz of being a part of this conspiracy and citing the civil prosecution of Nuccio. The article implied that Gertz had a criminal record, and it labeled him a "Leninist" and a "Communist-fronter."[29]

On appeal, the defendant contended that the *Sullivan* standard applied, since Gertz was a public figure, either for all purposes or at least for the limited purpose of the Nuccio affair. The Court rejected these contentions. Although Gertz had long been active in civic and professional affairs, had authored books and articles on legal subjects, and consequently had become "well-known in some circles," he did not qualify as an all-purpose public figure. The Court stated, "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his

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27. *Id.*
28. *Id.*
29. *Id.* at 326.
30. *Id.* at 351. The Court observed:

> Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well-known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes.

Id.

The Court also refused to classify plaintiff Gertz as a public official merely because he "had served briefly on housing committees appointed by the mayor of Chicago" several years earlier; nor was he a public official simply because he was a lawyer and an "officer of the court," since such a construction would "sweep all lawyers" within the *Sullivan* standard and "distort the plain meaning of the 'public official' category beyond all recognition." *Id.*

life."[30] Nor was the Court willing to assign Gertz to the limited-purpose public figure category, since the attorney's activities "related solely to his representation of a private client."[31]

The line between the all-purpose and the limited-purpose public figure is blurred in the opinion. There is a suggestion that Gertz might have qualified as an all-purpose figure if the jurors in the wrongful death case "had ever heard" of him prior to that litigation—at least if the jurors' recognition were typical "of the local population." This kind of notoriety would more properly be classified as limited-purpose.

The *Gertz* Court's indicia of limited-purpose public status are even more uncertain. Apparently, Gertz, might have been a public figure for the limited purposes of the Nuccio affair if he had played something more than "a minimal role at the coroner's inquest"; if he had in some way taken part "in the criminal prosecution of officer Nuccio"; or if he had discussed, or been quoted as discussing, either "the criminal or civil litigation with the press."[32] Would the presence of any *one* of these factors have thrust Gertz "into the vortex of this public issue?" If not, what combination of factors, or what degree of involvement in society's affairs, would have rendered Gertz a public figure? What other possible factors not discussed by the Court might have been relevant to the outcome, had they existed? Is Gertz now a public figure because he carried his case to the United States Supreme Court and provided the material for a major decision on the law of defamation? It seems patent that courts attempting to apply the *Gertz* rule cannot avoid being embroiled in *ad hoc* determinations of all-purpose and limited-purpose public status, which probably will be no less complex than the task of determining whether issues are of general or public interest.

Moreover, it is at the limited public status level that questions of voluntary involvement become most acute. Would Gertz have been consciously involving himself in public issues, accepting the trade-off of increased risk of defamation in return

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31. *Id.* at 352. In support of its holding, the Court noted that petitioner played a minimal role at the coroner's inquest . . . . He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. *Id.*

32. *See* note 31 *supra*.

for greater public exposure, if, for example, he had asked questions of the accused at the inquest? What if the press had sought him out for comments on the case? Would he have been obliged to remain silent or lose his private status? Suppose it had erroneously been reported that he had spoken to the press? Would the error constitute "voluntary" surrender of his private status?

A key issue raised by the *Gertz* case is that of publicity by association. Many people who could not themselves be considered public figures are acquainted with, or associate in various ways with, those who are. Will such associations draw an otherwise private person into the vortex of a particular public issue, or elevate him to public figure status? In such a case, the allegedly defamatory publication would have to relate to the association that had projected the plaintiff into the limelight in order to trigger the *Sullivan* rule; but how close and direct a relationship would be necessary?

The basic problem with the *Gertz* decision appears to be an unresolved and deep-seated tension between the individual's interest in privacy and the public's interest in knowing. The privacy interest may remain more or less constant for the average person, but the public interest in knowing varies greatly depending on the issues involved. If *Gertz* simply stands for the proposition that the privacy interest diminishes as the public interest increases, then its rule is little more than a highly circuitous and misleading way of preserving the public-interest standard that was thought to control before the decision was rendered.

Opportunity to Reply

The second major policy basis for distinguishing between rights of recovery in defamation by public and private persons is the presumed difference in their ability to reply to defamatory remarks. The *Gertz* Court reasoned that public officials and public figures "usually enjoy significantly greater access to the channels of effective communication" than do private individuals, and "hence have a more realistic opportunity to counteract false statements."[33]

After *Miami Herald Publishing Co. v. Tornillo*,[34] it is clear

33. 418 U.S. at 344.

34. 418 U.S. 241 (1974). Justices Brennan and Rehnquist concurred, noting that the decision "implies no view upon the constitutionality of 'retraction' statutes afford-

that states may not constitutionally require newspapers or magazines to provide an aggrieved person with an opportunity for reply; and there is no guarantee of reply for the average individual by means of radio or television.[35] Further, there is no empirical data to support a conclusion that public persons are generally wealthier and therefore more able to purchase access to channels of mass communication than private persons, nor should it be assumed that the Court indulged in any such discriminatory presumption. Ability to pay is not an unknown criterion in our legal framework, but it should not be used as a means for determining substantive legal rights.

Bascially, then, one's opportunity to rebut a widely disseminated defamation depends on the willingness of the news media to cooperate. The *Gertz* Court appears to assume that the affairs of public officials and public figures are more newsworthy than those of private individuals, and that, as a consequence, the news media will more readily seek them out to obtain and publish their version of any public-interest issue in which they are involved. But how accurate is this assumption? How likely is it, for example, that *American Opinion* would have sought out Elmer Gertz for his version of the Nuccio affair, regardless of whether Gertz were a public or private person? Assuming Gertz were a public person, all-purpose or limited, would any other news organ have been interested in taking up this particular controversy? What is deemed newsworthy by one publisher or broadcaster might not be considered worth mentioning by another. In any event, will a reply through an accessible second medium reach the audience that counts—those who received the defamatory material from an-

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ing plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction." *Id.* at 258. Retraction statutes operate to reduce damages where the publisher of defamatory statements voluntarily elects to retract. *See* Note, 80 HARV. L. REV. 1730, 1740 (1967).

35. The "fairness doctrine" of the 1934 Communications Act, 47 U.S.C. § 151 *et seq.* (1970), does not require broadcasters to accept editorial advertisements. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The scope of the doctrine may be quite limited. *See* Nat'l Broadcasting Co., Inc. v. FCC, 516 F.2d 1101 (D.C. Cir. 1975). It has been argued that the doctrine should be abolished entirely with the advent of cable television, which effectively undermines the "limited access" rationale that was used as the constitutional justification for such regulation in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *See* Simmons, *The Fairness Doctrine and Cable Television*, 11 HARV. J. LEGIS. 629 (1974).

The broadcasting right of reply afforded political candidates is also of limited scope. *See* 47 U.S.C. § 315 (1970).

other source? Or will it merely fan the flames by spreading the libel it is meant to rebut?

Reply through a medium over which one has no means of control often proves less than satisfactory. Seldom do the news media publish an unvarnished, verbatim reply, especially on a matter of substantial public interest. Anyone who has ever been quoted in the news may be uncomfortably familiar with misinterpretation, unintended emphasis, critical omissions or misleading elaboration—all perhaps well-intended, but nonetheless inaccurate. The hotter the controversy, the more likely it is that these distortions will creep in, and the more certain that reply will beget counter-reply, ultimately increasing both the dissemination and the impact of the original libel. Reply is clearly no substitute for uninvaded privacy.[36] Such, however, is the nature of newsworthiness, and the very strong policy rooted in the first amendment demands toleration of the bad in order to achieve the greater good.[37]

Whatever value there may be in an opportunity to reply, it seems evident that the opportunity itself turns not upon one's public or private status, but on the newsworthiness of the subject matter. The simple folk may wonder what the King is doing tonight, and their interest may be largely a function of his public status; but, for the most part, news has value independent of the status of those involved. A death resulting from an automobile accident will likely make the papers, whoever is involved. If one of the persons is a United States senator, the coverage will clearly be more widespread, thorough and sustained than if he were John Doe. On the other hand, John Doe may have less need of reply, and less difficulty in replying within his relatively restricted community of associates. If, however, Doe and the senator are involved in the same incident, they will both be swept into the vortex of public controversy, regardless of who is "public" and who "private." When the walls at Watergate began to crumble, the conduct of secretaries and minor functionaries was held up to the same searing public scrutiny as that of the President.

III. Opinion or Fair Comment

Gertz contains dictum which may well signal the end of

36. The *Gertz* Court acknowledged the inadequacy of rebuttal as redress, but asserted that opportunity to reply was nevertheless "[relevant] to our inquiry." 418 U.S. at 344 n.9.

37. *See, e.g., id.* at 340.

Sullivan and its progeny and a shift toward the Black-Douglas theory of absolute constitutional protection for publication of defamatory opinion:[38]

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.[39]

The decision leaves undefined the terms "idea" and "opinion," and it does not indicate how they may be distinguished from defamatory falsehood, which enjoys no absolute constitutional protection.

The *Gertz* dictum is the basis for the Court's decision in *Letter Carriers Branch 496 v. Austin,*[40] argued at the same time as *Gertz*. In that case, federal postal employees sought damages against the Letter Carriers' Union for allegedly defamatory remarks published in a monthly union newsletter. The publication described the plaintiffs as "scabs" and embellished the term with a definition excerpted from "a well-known piece of trade union literature, generally attributed to author Jack London."[41] The definition, several paragraphs in length, concluded with the statement that "a SCAB is a traitor to his God, his country, his family and his class."[42]

Plaintiffs' judgment for compensatory and punitive damages was upheld in the state courts,[43] but the United States Supreme Court reversed, holding the speech absolutely protected under federal law, since "naming the appellees as scabs was literally and factually true."[44] As for the definition, " 'to use loose language or unidentified slogans that are part of the conventional give-and-take in our economic and political con-

38. *E.g., id.* at 355 (Douglas, J., dissenting); Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967) (Black, J. concurring and dissenting); Garrison v. Louisiana, 379 U.S. 64, 80 (1964) (Douglas, J., concurring); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Smith v. California, 361 U.S. 147, 155 (1959) (Black, J., concurring); Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas & Black, JJ., dissenting).

39. 418 U.S. at 339-40.

40. 418 U.S. 264 (1974).

41. *Id.* at 268.

42. *Id.*

43. *Id.* at 269.

44. *Id.* at 282-83.

troversies—like "unfair" or "fascist"—is not to falsify facts.' "[45] The words were

> obviously used here in a loose, figurative sense to demonstrate the Union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal law. Here, too, "there is no such thing as a false idea."[46]

The constitutional impact of the *Austin* decision is not clear, since the holding was based on the conclusion that the "publication is protected under the federal labor laws," which favor free and robust discussion in labor matters.[47] The Court did not consider the first amendment arguments advanced by the union.[48] It did, however, cite as authority *Greenbelt Publishing Association v. Bresler*.[49]

The *Bresler* case involved newspaper accounts of city council meetings, at which plaintiff's efforts to obtain bargaining advantage in a land deal with the city were described by some of the people attending the meeting as "blackmail."[50] The Court held that the defendant newspaper's reports of these meetings, which repeated the "blackmail" charge, were "accurate," "truthful" and "full reports of these public debates."[51] In concluding that the reports were absolutely privileged, the Court said:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is com-

45. *Id.* at 284, *quoting* Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943).
46. *Id.*
47. *Id.* at 286-87.
48. *Id.* at 283 n.15.
49. 398 U.S. 6 (1970).
50. *Id.* at 7.
51. *Id.* at 13.

> pletely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.[52]

The Court emphasized in both *Austin* and *Bresler* that defendants' statements might have been unprivileged if they had been misleading. In *Bresler,* the majority stated that, had the reports been "truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meatings," a different result would have ensued.[53] The *Austin* decision noted that, in some situations, rhetoric such as that employed by the Letter Carriers' Union might be actionable, "particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact."[54]

The *Restatement of Torts* has attempted to articulate the constitutional protection afforded opinion or fair comment:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.[55]

The "only if" clause is apparently intended to embody the "truncated or distorted" and "out of context" caveats of *Bresler* and *Austin.*

The opinion exception in defamation law raises a number of questions. False and defamatory *facts* contained in an expression of opinion appear to be actionable unless otherwise privileged; but the line between fact and opinion is a hazy one indeed. What about an opinion based solely on another opinion? Must the facts known or assumed by both parties to the communication be thought of as true? If so, the rule may give less protection than that already afforded by *Sullivan.* In any event, presumably the knowledge or assumption of the recipient of the communication is immaterial as long as the publisher meets the *Sullivan* or *Gertz* standard of care, whichever is applicable, regarding the assumed facts.[56]

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52. *Id.* at 14.

53. *Id.* at 13.

54. 418 U.S. at 286.

55. RESTATEMENT (SECOND) OF TORTS § 566 (Tent. Draft No. 21, May, 1975).

56. *Compare* Berg v. Printers' Ink Publishing Co., 54 F. Supp. 795, 797 (S.D.N.Y. 1943) ("[T]he fact that the comment or criticism is one which is not reasonably warranted by the facts upon which it is based or is fantastic or extravagant, is immaterial"), *with* Buckley v. Vidal, 327 F. Supp. 1051, 1053-54 (S.D.N.Y. 1971) ("The

The holdings in *Bresler* and *Austin* may be explained without resort to an elaborate opinion rule. In both cases, the words, whether characterized as fact or opinion, were found not reasonably subject to a defamatory construction. In *Bresler* the Court says just that.[57] In *Austin* the words fall within a recognized exception to the law of defamation: language that is mere vituperation and abuse, or vulgar name-calling.[58] Neither case rules out the possibility that sober and reflective opinion which is false and defamatory may be actionable unless the publisher meets the *Sullivan* or *Gertz* standard of care, whichever is applicable.

IV. DEFAMATORY STATEMENTS NOT CONSTITUTIONALLY PROTECTED

Private Matters

An earlier draft of the *Restatement of Torts* provided absolute protection for a statement of opinion "at least if it is on a matter of public concern."[59] The implication was that the pro-

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question for the court is . . . whether plaintiff's comments are so obviously without basis in fact as to be adjudged unfair or dishonest"). The *Buckley* court also stated that "the critic enjoys a privilege to make such critical comments [on the published work of an author] as long as the comment does not go beyond the published work itself to attack the author personally." 327 F. Supp. at 1052-53. There is nothing in *Austin* or *Bresler*, however, to suggest a distinction between an author's works and the author himself, or to imply that the opinion privilege applies only to criticism of writers.

57. 398 U.S. at 14.

58. The *Austin* Court acknowledged that its own decisions and those of the National Labor Relations Board have traditionally accorded the parties to labor disputes considerable latitude in the use of vituperative language: " '[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.' " 418 U.S. at 284, *quoting* Linn v. Plant Guard Workers, 383 U.S. 53, 63 (1966). *See also* Cambria Clay Products Co., 106 N.L.R.B. 267 (1953), *enforced*, 215 F.2d 48 (6th Cir. 1954). Nor is the "vulgar name-calling" exception restricted to labor disputes. *E.g.*, Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966) ("bastards"); Botarmuzzi v. Shevack, 108 N.Y.S.2d 172 (Sup. Ct. 1951) ("bleached blond bastard, a God damn son of a bitch and a bum and a tramp").

59. The earlier draft provided:

> A defamatory communication may consist of a statement in the form of an opinion. A statement of this nature, at least if it is on a matter of public concern, is actionable, however, only if it also expresses, or implies the assertion of, a false and defamatory fact which is not known or assumed by both parties to the communication.

RESTATEMENT (SECOND) OF TORTS § 566 (Tent. Draft No. 21, April, 1975). The "at least" clause was struck by the ALI at its meeting in May, 1975. 1975 ALI PROCEEDINGS 127. As Justice Robert Braucher said, "[T]he 'at least' leaves everything at sea." *Id.* at 124. The viewpoint of the Reporter, Professor John Wade, was that the "implications"

tection of the opinion rule might be unavailable, or at least not constitutionally required, if the statement concerned a non-public matter. The conditional protection of the stringent *Sullivan* standard might also be unavailable in such a case, even if the statement involved a public official or public figure, since the *Sullivan* rule does not cover a completely private matter which neither touches on an official's fitness for office nor relates to the public status of a public figure.[60] In that event, the defendant's only source of constitutional protection, if any, would be that provided by *Gertz*.

It is possible, however, that not even *Gertz* will provide constitutional protection for a statement, whether of fact or opinion, about a matter of no public interest. The Supreme Court has not yet addressed this issue, but it is significant that all of its decisions from *Sullivan* to *Gertz* have involved matters of public concern, and that the emphasis of these decisions has been on the public's interest in having access to information.[61]

The question is academic if one concludes that virtually any subject is a matter of public concern, whether or not it has any legitimate informational or educative value. However, it is quite conceivable that idle gossip about the affairs of private individuals, and like matters, are of no public concern, and perhaps not subject to constitutional protection under any circumstances.[62]

The key question in this context is whether the Court will, or should, distinguish on constitutional grounds between various types of speech, using relative educative value as the criterion. Such a distinction raises the specter of the "public interest" definitional quagmire which the Court so assiduously attempted to avoid in *Gertz*. The potential difficulty is a very real one. Changing circumstances may make today's idle gossip tomorrow's front-page news. Where the alleged defamation involves purely private matters, it seems reasonable to require

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of the constitutional decisions "are strong enough to apply to the private situation too." *Id.* at 125.

60. Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (the public's interest, and thus the protection of the *Sullivan* rule, extends, in the case of a public official, only to "anything which might touch on an official's fitness for office").

61. *See* General Motors Corp. v. Piskor, 27 Md. App. 95, 340 A.2d 767 (1975), holding that *Gertz* does not apply to "purely private defamation" (slander of an employee accused of theft).

62. In such situations the aggrieved party might also have an action for invasion of privacy. *See* text accompanying notes 85-97 *infra*. But not all jurisdictions recognize this tort, and in any event the availability of one remedy is not generally thought to preclude another appropriate one.

the plaintiff to prove negligence on the defendant's part. That is the minimum required for almost all other private torts, and it would be anomalous to hold the private individual to a higher standard for his words than for his acts.

Further, the *Gertz* rule can be narrowly interpreted as protecting only the news media, and not other persons or entities. The holding is stated in terms of the need to safeguard the rights of "a publisher or broadcaster."[63] It is likely, however, that the decision was intended to encompass defamation by anyone, in any form;[64] there is no reason to provide less protection for non-medium defendants.[65] If any differentiation is to be made, the media probably should be afforded less protection than the private individual, since they are composed of knowledgeable professionals who owe a fiduciary duty to the public and who have a correspondingly great capacity to do harm via the spoken or written word.

Commercial Speech

Another possible candidate for exclusion from constitutional protection for defamation is commercial speech. The Court has excepted such speech from first amendment protection in various contexts,[66] but the issue has never been

63. 418 U.S. at 347.

64. *See* the dissenting opinion of Mr. Justice White in *Gertz:* "[The] result is accomplished by requiring the plaintiff in *each and every defamation action* to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation . . . ." 418 U.S. at 370 (emphasis added).

65. In Sindorf v. Jacron Sales Co., Inc., 27 Md. App. 53, 341 A.2d 856 (1975), the court held that *Gertz* applies to non-media as well as to media defendants. Noting that a number of United States Supreme Court cases applying *Sullivan* have involved non-media defendants (who, however, were using the media), the court concluded that private individuals may be "an important source of public interest items" and that a distinction between media and non-media would give rise to "many gray areas." It would pose "problems of application resulting in chaos," as, for example, in classifying industry newsletters, amateur radio operators, credit reports, or publications of professional and social organizations. *Id.* at ____, 341 A.2d at 881. The "important source" and "gray area" rationales did not deter the same court, however, from distinguishing between "public" and "private" defamation. *See* note 61 *supra*. For an analysis of the arguments for and against applying *Gertz* to non-media defendants, *see* Nimmer, *Is Freedom of the Press a Redundancy: Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 647-58 (1975); Comment, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974).

66. A significant recent decision, canvassing the authorities, is Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), which upholds state authority to prohibit sexually discriminatory newspaper advertisements. *See* Comment, *Sex Discrimination in Help Wanted Advertising*, 15 SANTA CLARA LAW. 183 (1974). *But see* Bigelow v. Virginia, 95 S. Ct. 2222 (1975), striking down a statute which

dealt with directly in a defamation case. While it is true that *Sullivan* involved a commercial advertisement, the Court found that much more than "commercial speech" was involved. It characterized the material in issue, ads detailing civil rights activities in Alabama and appealing for contributions to the Martin Luther King, Jr., Defense Fund, as "editorial advertisements" which "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[67] Clearly this was no ordinary commercial advertisement.

One area which may well lie outside the *Sullivan* umbrella is that of mercantile credit reports. The Third Circuit excluded such material from *Sullivan* protection in *Grove v. Dun & Bradstreet, Inc.*,[68] a case decided at a time when the *Sullivan* standard was thought to extend to all matters of public interest. The court of appeals held that a private credit report involving the financial status of the plaintiff did not constitute a matter of public interest.[69] A crucial factor, in the court's view, was the confidential nature of the report: "Plaintiff here is denied that opportunity to respond to such false assertions both because it lacks the very access to the medium which *Times* and its progeny assumed, and for the more pernicious reason that the source or nature of the assertions may never be exposed."[70]

It is unclear whether the *Gertz* standard—minimum showing of negligent publication—would apply to such a case. The *Gertz* opinion, of course, is based on the assumption that nonpublic figures lack access to the public media,[71] but it nevertheless requires a showing of negligence. Thus the Third Circuit's conclusion that lack of opportunity to reply rules out any constitutional protection is destroyed by *Gertz*. The confidentiality aspect of *Grove*, however, is not directly addressed in *Gertz*. Nor, for that matter, does the *Grove* court deal with the relev-

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prohibited advertisement in Virginia of out-of-state abortions. For a critical discussion of the commercial speech issue, *see* DeVore & Nelson, *Commercial Speech and Paid Access to the Press*, 26 HASTINGS L.J. 745 (1975).

67. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

68. 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971) (Douglas, J., dissenting).

69. *Id.* at 437.

70. *Id.*

71. *See* text accompanying note 33 *supra*.

ance, if any, of the purely commercial aspect of the transaction involved.

If dissemination of purely private material that can only be classified as idle gossip is to be given some protection by the *Gertz* negligence rule,[72] it can be argued that commercial speech is at least as worthy of protection. On the other hand, many areas of commercial speech, notably express sales warranties, have never been thought to merit constitutional protection from strict liability,[73] and to afford such protection would effect a major change in present-day tort and sales law.

The differences between sales misrepresentations and commercial defamation are obvious, but they may not be as significant as they appear. Express warranties, for which the seller can be held strictly liable, may go beyond the implied warranties attached by law to the transferred goods themselves, and in many instances, the damage from defamatory commercial speech may be substantially greater than that from sales misrepresentations.

One notable similarity between sales misrepresentations and commercial defamation—a factor which serves to distinguish both from idle gossip—is that in the commercial situation, both the publisher and the seller of goods are in the business of making statements for a profit. Perhaps by analogy to the risk-spreading rationale of strict products liability, it is appropriate for a commercial disseminator of defamatory material to bear the risk of his statements, even if innocent, as a cost of doing business. The purveyor of idle gossip, on the other hand, presumably is not in the business of rumor-mongering; nor does the risk-spreading rationale apply. Thus, there may be reason to except commercial speech from even the minimal protection afforded by the *Gertz* negligence rule.

V. Common Law Rules: Damages and Privileges

Damages

Sullivan and *Gertz* either determine or significantly affect the common law standard of care for defamation actions; and as previously noted, *Gertz* imposes substantial restrictions on recoverable damages in such actions by requiring proof of ac-

72. *See* text accompanying note 62 *supra*.

73. *E.g.*, Baxter v. Ford Motor Co., 179 Wash. 123, 35 P.2d 1090 (1934), considered the seminal case on strict liability for express warranties.

tual harm and by prohibiting the recovery of punitive damages unless constitutional malice is shown.[74]

The actual-harm requirement of *Gertz* is unlikely to effect any major change in the common law, or to impose any noticeably greater burden of proof on the plaintiff. "Actual injury," as defined by the Court, includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[75] It is highly unlikely that a defamed plaintiff would choose to litigate at all unless one or more of these damage elements were present, and normally the plaintiff seeks to prove such damages in any event, to increase the likelihood and the amount of recovery.

The fact that *Gertz* establishes proof of actual harm as a minimum requirement does not prevent the states from imposing more stringent proof requirements for damages. Specifically, the states are free to maintain the common law distinction between libel and slander per se, and all other forms of slander, a distinction which generally involves requiring proof of special damages, or out-of-pocket loss, for the second classification.[76] It is questionable whether this distinction should be maintained, however, in view of the blurred lines between libel and slander in modern society.[77]

The punitive damage restrictions of *Gertz* may have much more impact. Punitive damage awards were very common in pre-*Gertz* cases; but in view of the difficulty of proving constitutional malice, such awards should be infrequent under present law. Nothing in *Gertz* prohibits a state from excluding recovery for punitive damages entirely, as some courts have done.[78] The highly speculative nature of such damages, coupled with the important first amendment considerations involved, suggests that such punitive awards should be prohibited in all defamation cases. As a practical matter, however, juries might well express their indignation in a particularly egregious case

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74. *See* text accompanying notes 7-9 *supra*.

75. 418 U.S. at 350.

76. The Restatement retains this distinction. RESTATEMENT (SECOND) OF TORTS §§ 569-74 (Tent. Draft No. 20, 1974). For a critical discussion of the damages issue in defamation law, *see* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUTGERS-CAMDEN L.J. 471, 498-512 (1975).

77. *See, e.g.*, Am. Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962), in which an exasperated court, confronted with the task of determining whether a defamatory television broadcast constituted slander or libel, ducked the classification issue by coining the term "defamacast."

78. *See* note 10 *supra*.

by inflating the compensatory damage award as a substitute for punitive damages. To date, courts have shown considerable reluctance to review jury awards of compensatory damages, but a footnote caveat in *Austin* suggests that courts should exercise greater supervision in this regard.[79]

Privileges

The common law has long recognized a number of privileges, both absolute and conditional, in the law of defamation.[80] Typical of the absolute privileges are those permitting legislators, courts and public officials to make defamatory statements in the conduct of their respective activities.[81] Probably the most common conditional privilege is that which allows a person to make statements which he reasonably believes necessary to protect or further an important interest either of himself or of another.[82]

An absolute privilege is presumably subject to no standard of care, and therefore needs no constitutional protection under *Sullivan* or *Gertz;* indeed, such a privilege may enjoy constitutional protection in its own right.[83] Conditional privileges, however, are subject to forfeiture by abuse—that is, when the publisher's conduct falls below some specified level of care, usually defined in terms of negligence or common law malice.[84]

It is evident that the negligence standard for determining abuse of conditional privilege has effectively been superseded in those cases where the *Gertz* rule applies. If *Gertz* indeed does *not* protect certain types of statements, such as idle private gossip or commercial speech, then the negligence abuse-of-privilege standard retains some usefulness. But for all situations covered by *Gertz,* the test for abuse of privilege will have

79. 418 U.S. 264, 287 n.17 (1974); *cf.* Cardillo v. Doubleday & Co., Inc., 518 F.2d 638 (2d Cir. 1975), sustaining a summary judgment against a defamation claim brought by one whom the court described as "libel-proof, *i.e.,* so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations." *Id.* at 639.

80. *See* RESTATEMENT (SECOND) OF TORTS §§ 585-612 (Tent. Draft No. 20, 1974).

81. New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964); RESTATEMENT (SECOND) OF TORTS §§ 585-91 (Tent. Draft No. 20, 1974).

82. RESTATEMENT (SECOND) OF TORTS §§ 594-95 (Tent. Draft No. 20, 1974).

83. Gravel v. United States, 408 U.S. 606 (1972) (legislator); Pierson v. Ray, 386 U.S. 547 (1967) (judge); Barr v. Mateo, 360 U.S. 564 (1959) (public official). The *Gravel* case is grounded on the speech or debate clause of the United States Constitution (article I, § 6).

84. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 792-96 (4th ed. 1971).

to become a showing of something akin to malice if the privilege is to retain any independent meaning.

VI. Invasion of Privacy

Throughout this article an individual's interest in his own reputation has been treated as a kind of right to privacy. The *Gertz* Court has underscored the inherent relation between defamation and privacy law by distinguishing between public and private figures. Yet the torts of invasion of privacy and defamation are very different in at least two important respects: first, an invasion of privacy need not involve falsehood to be actionable; and second, even when falsehood is present, a plaintiff need not show the kind of injury—public disgrace or ridicule—that is the basis of a defamation action. It is generally sufficient in an invasion of privacy case to show that some matter has been made public, or a right to solitude invaded, in an unreasonable or unjustified manner.[85]

The tort of privacy invasion has been described as involving four distinct protected interests, invasion of any one of which may give rise to a cause of action. A right of privacy may be invaded by publicizing a matter which unreasonably places another in a false light; by unreasonably publicizing a matter concerning another's private life; by intentionally and unreasonably intruding upon another's solitude or seclusion; or by appropriating to one's own use or benefit another's name or likeness.[86] The common law privileges applicable to the law of defamation may also apply to invasion of privacy.[87] In addition, there are constitutional restrictions on the tort law of privacy invasion, although the scope of these restrictions is at present uncertain.

False-Light Invasion of Privacy

In *Time, Inc. v. Hill,*[88] the Supreme Court held that to recover in a false-light action, the plaintiff must prove the defendant knowingly placed him in false light in the public eye, or did so with reckless disregard for the truth. Thus *Hill* established for this type of privacy action the same constitutional

85. *See* Zolich, *Laudatory Invasion of Privacy,* 16 Clev.-Mar. L. Rev. 540 (1967).
86. W. Prosser, Handbook of the Law of Torts 804-14 (4th ed. 1971).
87. Restatement (Second) of Torts §§ 652F-G (Tent. Draft No. 21, May, 1975).
88. 385 U.S. 374 (1967).

malice standard that *Sullivan* had applied to defamation of public officials and public figures.

In *Hill,* what triggered application of the *Sullivan* rule was the presence of "matters of public interest."[89] The fact that the Hills were private persons, or at most involuntary public figures, was deemed irrelevant by the Court. After *Gertz,* the continued vitality of the *Hill* decision is in substantial doubt.[90] There seems to be no justification for holding the false-light victim to a higher burden of proof than his private counterpart in a defamation action. The only conceivable basis for doing so is to assume either that the false-light victim's interest in his privacy is less weighty than the defamation victim's interest in his reputation, or that the defendant in a false-light case has a correspondingly greater interest in publishing than a defamation defendant does. Neither seems persuasive as a general proposition.

Invasion of Solitude

The constitutional limitations on the tort of invasion of solitude or public exposure of private life are equally unclear. No falsehood or misleading representation need be present to support this action, so the constitutional restrictions of *Sullivan* and *Gertz,* which govern liability for publication of false statements, are by definition inapplicable. It is possible, however, that there may be a constitutional requirement of culpability greater than mere negligence. The solitude-invasion aspect of the privacy tort carries with it an implication of intentional misconduct by the defendant, suggestive of the *Sullivan* requirement of knowledge or recklessness. By analogy to *Gertz,* negligent rather than intentional or reckless misconduct would be constitutionally sufficient when the tortious invasion involves publication and the victim is a private person.[91]

There remains unresolved, however, the question of whether truthful publication of matters concerning an individ-

89. *Id.* at 388.

90. In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), a false-light privacy invasion case decided after *Gertz,* the Court was not presented with the question of whether the *Sullivan* standard continues to govern all public interest cases. Justice Powell, concurring in Cox Broadcasting Corp. v. Cohn, 95 S. Ct. 1029, 1048 n.2 (1975), noted that *Gertz* "calls into question the conceptual basis of Time, Inc. v. Hill."

91. Tortious invasion of solitude, however, does not require any element of publication, and if the alleged intrusion involved no publication or other conduct classifiable as speech, the defendant would not be entitled to first amendment protection.

ual's private life is entitled to constitutional protection when those matters are of public interest or concern, regardless of whether the victim is deemed a public figure.[92] In *Cox Broadcasting Corp. v. Cohn,*[93] the Supreme Court held that the first amendment prohibited a state from imposing tort sanctions for an invasion of privacy arising from the accurate publication of a rape victim's name, where the information was obtained from judicial records of a criminal prosecution that were open to public inspection.[94] The decision seems based on the public's right to know about matters of public interest or concern, even when the subject of this interest is a private figure.

The scope of the *Cox* holding is rendered uncertain by two factors: first, the Court suggested that states may be able to protect an individual's interest in his privacy by prohibiting public disclosure of such matters if the prohibition is "by means which avoid public documentation or other exposure of private information";[95] and second, the Court emphasized the fact that the defendant did not obtain the victim's name "in an improper fashion."[96] The suggestion that improper conduct by the defendant might limit the availability of constitutional protection is ambiguous. The Court might have been referring solely to violations of appropriate state prohibitions, or the caveat might also have been intended to include other forms of culpable misconduct such as theft of the information, failure to obtain the subject's permission to publish, or publication of some private matter of no public interest or concern. In any event, *Cox* can hardly be read as an outright prohibition against imposing tort liability for publication of matters of public interest, much less matters of purely private concern.

Appropriation of Name or Likeness

The remaining branch of the privacy tort involves the appropriation of a person's name or likeness for the benefit of another. Although it may involve an intrusion upon individual privacy, a primary purpose of the appropriation tort is to prevent unjust enrichment of the defendant at his victim's expense. Cases in this category most frequently arise when the

92. *See* Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

93. 95 S. Ct. 1029 (1975).

94. *Id.* at 1044, 1046.

95. *Id.* at 1047.

96. *Id.* at 1047.

plaintiff's name or likeness has some commercial value, and the defendant seeks to exploit this value without paying the plaintiff or obtaining his consent.[97]

If such a commercial exploitation does not significantly touch upon matters of public interest or concern, it is arguable, as in the case of purely commercial defamation, that no first amendment restrictions apply, and that, accordingly, the states are free to fashion such standards of care and rules of damages as they see fit. Indeed, the case for freedom from constitutional strictures may be stronger here than in the case of commercial defamation, since the unjust enrichment element substantially weakens the equities of the defendant's case.

VII. CONCLUSION

In *Gertz v. Robert Welch, Inc.*, the Supreme Court distinguished between public and private persons for purposes of determining the standard of care applicable to defendants in defamation actions. There is substantial doubt as to whether the *Gertz* rule will achieve its stated purpose: to avoid the necessity for trial courts' making *ad hoc* determinations as to the appropriate standard of care. Nor is it clear that the rule accurately reflects the avowed policies and constitutional considerations in this area. Whether the appropriate test in a defamation action is negligent publication, constitutional malice, or some other standard, is a question that involves issues substantially independent of the victim's status as a public or private person. If the public's interest in knowing is sufficiently great, that interest should be the decisive factor in determining the applicable standard of care for publication of false and defamatory statements, regardless of the plaintiff's status.

In addition, the *Gertz* rule has created a potential anomaly in the privacy area. If the holding in *Time, Inc. v. Hill*[98] remains viable after *Gertz*, the defendant in a false-light invasion of privacy case is afforded the full protection of the *Sullivan* constitutional malice standard, while his counterpart in a defamation action can be held liable for mere negligence in the publication of false material. There appears to be no reason for

97. *Compare* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974), *with* Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719 (Tex. Civ. App. 1975).

98. 385 U.S. 374 (1967).

the gross disparity in burden of proof in two such similar actions.

A number of issues remain unresolved regarding application of the first amendment to the law of defamation and invasion of privacy. Among the most pressing are questions regarding the scope of the opinion rule in defamation law, and the applicability of first amendment protection to statements such as private gossip and commercial speech, which arguably involve no matters of public interest or concern. Inherent in these issues, of course, are questions as to the precise definition of "matters of public interest or concern"—a concept which the Court unsuccessfully sought to side-step in the *Gertz* decision.

In any event, the *Gertz* case is laudable for the substantial restrictions it imposes upon punitive damage recoveries in defamation actions. The apparent trend among states toward complete elimination of punitive damages in defamation actions[99] should be extended at least to tortious invasions of privacy involving publication or speech. Awarding punitive damages is a questionable practice in any area of tort law, and the issue is particularly acute where first amendment interests are involved. Restrictions on punitive damages will require greater vigilance on the part of the courts in monitoring jury verdicts, to assure that in cases involving particularly egregious or offensive fact situations, juries do not grant exemplary awards in the guise of compensatory damages.

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99. *See* note 10 *supra*.